

**NORHAZLENA ABDURANI & ORS v. ANTONIO SIM PEAK
KHIONG & ORS**

HIGH COURT SABAH & SARAWAK, BINTULU

LEE HENG CHEONG J

[SUIT NO: BTU-22NCVC-1-9-2013]

29 DECEMBER 2014

CIVIL PROCEDURE: *Summary application – Rules of Court 2012, O. 14A – Summary determination of claim – Rephrasing of questions of law in notice of application – Discretion of court – Whether court had discretion to draft or re-draft questions of law*

CIVIL PROCEDURE: *Limitation of action – Malfeasance – Compensation for – Rendering negligent advice – Limitation period of tort of malfeasance – Whether action time barred – Sarawak Limitation Ordinance, Schedule item 19 & 97*

CIVIL PROCEDURE: *Limitation of action – Contract – Compensation for breach of oral retainer – Rendering negligent advice – Limitation period for breach of oral retainer – Whether action time barred – Sarawak Limitation Ordinance, Schedule item 93*

CIVIL PROCEDURE: *Limitation of action – Contract – Breach of letter of undertaking – Whether plaintiffs claim time barred – Sarawak Limitation Ordinance, Schedule item 94*

CIVIL PROCEDURE: *Action – Cause of action – Dispute as to transfer of land – Whether transaction tainted with illegality – Whether contravened s. 8(a) and (b) of Land Code (Cap 81) (Sarawak) – Whether plaintiffs entitled to claim for loss and damages*

CONTRACT: *Contingent contract – Refund – Claim for refund of money depending on contingency of event – Whether plaintiffs allowed to claim for refund – Whether refund subject to contingency of specific event*

The plaintiffs' claim, in essence was grounded on three causes of action namely: (i) breaches of warranty of good title to or right or power to sell a parcel of land ('the said land'); and/or (ii) negligence in the rendering of advice, in breach of oral retainer ('negligent acts'); and (iii) breach of the letter of undertaking dated 25 September 2001. The plaintiffs, in their amended statement of claim, pleaded that the defendants warranted to them, that the first and second defendants had good title to and authority to the said land without reference to the land owner, and, acting on the said representation or warranty, the first plaintiff not only executed a memorandum of transfer and the power of attorney in favour of the second to the sixth plaintiffs but also paid the purchase price for the subject land. The defendants, *vide* an application pursuant to O. 14A and/or O. 32 r. 2 of

- A the Rules of Court 2012 ('ROC') and/or inherent jurisdiction of court, or alternatively under O. 18 r. 19 of the ROC, for the determination of three questions of law *ie*: (i) whether the plaintiffs' claims were barred by the operation of the Limitation Ordinance (Cap 49); (ii) whether the causes of action based upon the transactions relating to the said land were illegal or
- B tainted with illegality on the ground that the transactions contravened s. 8(a) and (b) of the Land Code (Cap 81), if yes, whether the plaintiffs were entitled in law to the reliefs claimed; and (iii) whether the plaintiffs were disentitled or precluded from claiming for a refund of RM205,000 under the letter of undertaking. From the outset, the plaintiffs raised a preliminary objection
- C pertaining to the rephrasing of question (i) whereby the plaintiffs contended that the rephrasing of question (i) should not be amended by way of a supplementary affidavit or in the manner as proposed by the defendants.

Held (dismissing plaintiffs' preliminary objection; allowing defendants' application; dismissing plaintiffs' claim with costs.):

- D (1) The plaintiffs' preliminary objection was without basis as pursuant to O. 14A of the ROC, the court, after perusal of relevant pleadings and notice of application, has the discretion to draft or re-draft the question of law stated in the notice of application as the court deems fit, in order to dispose of the case or a major part of the case or the most significant
- E issue in the case. (para 6)
- (2) Pursuant to item 19 of the Schedule of the Sarawak Limitation Ordinance ('Ordinance'), the limitation period for a claim under tort of malfeasance, independent of contract *ie* for loss and damages grounded on breach of warranty of good title or of right to sell and/or the
- F rendering of negligent advice is two years from the date of when malfeasance took place and the limitation period set in, on 8 October 2003 pursuant to item 19 of the Ordinance. The limitation period for the said malfeasance, if based on contract under the residuary provision, expired on 8 October 2007 pursuant to item 97 of the Ordinance which
- G is six years from the date when the malfeasance took place. Since the plaintiffs' claim was filed on 19 September 2013, it was clearly time barred under both the said items 19 and 97 of the Ordinance. (para 17)
- (3) Causes of action founded on breaches of oral retainer were time barred as the present action was commenced only on 19 September 2013. The
- H period of limitation for claims for rendering negligent advice on the sale of subject land and for rendering negligent advice on appeal against the decision of High Court expired on 8 October 2014 and 20 February 2007. (para 23)

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- (4) The plaintiffs' causes of action based upon transactions relating to all parcel of the said land were illegal or tainted with illegality on the ground that these transactions contravened s. 8(a) and (b) of the Land Code. The plaintiffs were not entitled in law to the relief claimed. (para 31) A
- (5) Since the present action was only instituted on 19 September 2013, the plaintiffs' claim grounded on breach of the letter of undertaking was thus barred by item 94 of the Ordinance. (paras 36 & 39) B
- (6) A perusal of the letter of undertaking showed that the refund of the sum RM205,000 was contingent upon the event that memorandum of transfer and the power of attorney were not registrable. However, this contingency did not arise as it was undisputed that both the said instruments were duly registered with Bintulu Land Office on 8 October 2001. The plaintiffs' were precluded from claiming for refund of RM205,000 pursuant to the letter of undertaking as the event upon which it became payable, had not occurred. Furthermore, to allow the refund of the said RM205,000 would be a clear infringement of the express provisions of s. 8(b) of the Land Code. (paras 41 & 42) C
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Case(s) referred to:

- Awang Osen Awang Mat v. Norhazleena Abdurani & Ors* [2004] 7 CLJ 1 HC (*refd*) E
- Capital One Ltd v. EC Corporate Management Inc & Ors* [2013] 1 LNS 819 HC (*refd*)
- Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC (*refd*)
- Kerajaan Negeri Terengganu v. Petroliaam Nasional & Anor* [2003] 1 MLJ 260 HC (*refd*)
- Korso Finance Establishment Anstalt v. John Wedge* [unreported, 15 Feb 1994, CA Transcript No. 14/387] (*refd*) F
- Maria Tunku Sabri v. Datuk Wan Johani Wan Hussin* [2011] 8 CLJ 859 HC (*refd*)
- Ng Wu Hong v. Abraham Verghese TV Abraham & Ors* [2011] 6 CLJ 322 HC (*refd*)
- Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337 CA (*refd*)
- Theow Say Kow @ Teoh Kiang Seng, Henry & Anor v. Teoh Kiang Hong & Ors* [2013] 1 LNS 1383 HC (*refd*) G

Legislation referred to:

- Contracts Act 1950, s. 24
- Land Code (Cap 81) (Sarawak), s. 8(a), (b)
- Rules of Court 2012, O. 14A, O. 18 r. 19, O. 33 r. 2
- Schedule of the Limitation Ordinance (Cap 49), items 19, 93, 94, 97 H
- For the plaintiffs - Lai Chee Wah; M/s Wan Ullok, Jugah Chin & Advocs*
- For the defendants - Rajesh; M/s Jethi & Assocs*

Reported by Thirunavakarasu Vijayan

A JUDGMENT

Lee Heng Cheong J:

Introduction

B [1] This application is made pursuant to O. 14A and/or O. 33 r. 2 and/or inherent jurisdiction of the court, or alternatively under O. 18 r. 19 all of the Rules of Court 2012 and is for the determination of the following three questions of law:

C (a) whether the claims of the plaintiffs herein as pleaded under para. 24 of the amended statement of claim are barred by the operation of the Limitation Ordinance (Cap 49);

D (b) whether the causes of action based upon the transactions relating to all that parcel of land described as Lot 584 Block 35 Kemena Land District (hereinafter referred to as “the said land”) pleaded in paras. 4 to 13 and 23 of the amended statement of claim were/are illegal or tainted with illegality on the ground that these transactions contravened ss. 8(a) and (b) of the Land Code (Cap 81);

E if the answer to the above question is in the affirmative, whether the plaintiffs are entitled in law to the reliefs claimed under the amended statement of claim; and

F (c) whether the plaintiffs were disentitled or precluded from claiming for a refund of RM205,000 under the letter of undertaking although the event upon which the refund was contingent, that is, the registration of both the memorandum of transfer and the power of attorney had occurred.

and, consequent to the said determination, the plaintiffs’ claim filed herein or such part(s) of the claim filed herein to be dismissed.

Law And Principles Applicable

G [2] In *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337 the Court of Appeal followed the English Court of Appeal decision of *Korso Finance Establishment Anstalt v. John Wedge* [unreported, 15 Feb 1994, CA Transcript No. 14/387] pertaining to the application of O. 14A at p. 351 and held as follows:

H In the same case it was held:

I In my judgment the question of construction is well capable of constituting an issue in the cause of matter. **An issue may be said to be a disputed point of fact or law relied on by way of claim or defence.** In the present case the determination of the question of construction one way or the other will finally determine an important issue, namely

whether the respondent are primarily liable under the agreement. If the determination is in favour of the appellant it will finally determine the entire matter ...

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The whole case does not have to be disposed off. It is sufficient if substantial matters can be disposed off.

The real question in this case at the end and really crucial one it seems to me is: will the court be able to dispose of the case or the major part of the case or the most significant issue in the case under O. 14A dealing with the matter today.

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(emphasis added)

[3] The case of *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* (*supra*) was followed in the case of *Theow Say Kow @ Teoh Kiang Seng, Henry & Anor v. Teoh Kiang Hong & Ors* [2013] 1 LNS 1383; [2014] 9 MLJ 32 where at p. 34 the court held *inter alia*:

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(5) The real question for the court in an O. 14A application was whether the court could dispose of the case or a major part of the case or the most significant issue in the case. From the words of O. 14A and the decision of the Court of Appeal in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 it was clear that for the to exercise its powers under O. 14A, the whole case did not have to be disposed of; it was sufficient if substantial matters could be disposed of. Where the question for determination was a dominant feature of the case, the court ought to proceed to determine the question under O. 14A. ...

D

(emphasis added)

[4] Bearing in mind and applying the principles laid down by the above cases, this court finds that the above three questions of law posed for determination are suitable for determination pursuant to the above principles as in the event the questions posed, are decided in the defendants' favour, they will dispose of the entire claim or a substantial part of it which will result in a saving of time and costs.

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Preliminary Objection Of The Plaintiff

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[5] The plaintiff raised a preliminary objection pertaining to the rephrasing of question No. 1(1) in this notice of application and this can be found at paras. 4 to 9 of the affidavit in opposition (IV) whereby the plaintiffs contend that "the rephrasing of question No. 1(1) in the said application *vide* the supplementary affidavit tantamount to an amendment of the application and it should not be amended by way of a supplementary affidavit or in the manner as proposed by the defendants".

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- A [6] This court finds that the plaintiff's preliminary objection is without basis as pursuant to O. 14A of the Rules of Court 2012, the court after perusal of the relevant pleadings and the notice of application has the discretion, to draft or re-draft the questions of law stated in the notice of application as the court deems fit, in order for the court to dispose of the case or a major part of the case or the most significant issue in the case. Support can be found in the decision of the Court of Appeal of *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337 where the Court of Appeal held *inter alia* at p. 361 as follows:

- C It is to be stressed that under both Orders the court can direct the question or issue to be determined or tried without the need for any party having to apply for it and the court may on its own frame or reframe the question or issue for the purpose of recast the question or issue proposed by the applicant or subtract therefrom or add thereto other question or issue. These can be gathered from the provisions of the Orders itself. It is manifestly evident that the court has a wide discretion on the matter.
- D What more in this case, where the applications are pitched under both Orders, the playing field within which for the learned judge to exercise his discretion is even wider.

[7] In the case of in *Kerajaan Negeri Terengganu v. Petroliaam Nasional & Anor* [2003] 1 MLJ 260 at p. 267, the court held *inter alia* as follows:

- E It should of course be noted that under O. 14A r. 1(2) RHC, the court has a wide discretion. It may upon determination of the question of law or construction, dismiss the action or make such order or judgment as it thinks just. Thus, the action may be disposed of without a full trial and the judgment or order will have the same force and effect as the judgment or order after a full trial of the action. The defendants herein urged the court to adopt this procedure in the disposal of this case.

(emphasis added)

Consideration Of The Three Questions Of Law Posed

- G *First Question Of Law: Whether The Claims Of The Plaintiffs Herein As Plead Under Para. 24 Of The Amended Statement Of Claim Are Barred By The Operation Of The Limitation Ordinance (Cap 49)*

[8] This court noted that the plaintiffs' claim herein, in essence is grounded on three causes of action namely:

- H (a) breaches of warranty of good title to or right or power to sell the subject land and/or negligence (hereinafter collectively referred to as "the negligent acts");
- (b) negligence in the rendering of advice, in breach of oral retainer; and
- I (c) breach of the letter of undertaking dated 25 September 2001.

[9] The plaintiffs in paras. 7 to 11 of the amended statement of claim, pleaded that the defendants warranted to them, that the first and second defendants had good title to and authority to sell the subject land without reference to the landowner, Awang Osen Bin Awang Mat and, acting on the said representation or warranty, the first plaintiff not only executed the memorandum of transfer and the power of attorney in favour of second to sixth plaintiffs but also paid the purchase price for the subject land (see para. 7 to 11 of the statement of claim).

[10] In para. 24 of the amended statement of claim, the plaintiffs pleaded that the defendants acted negligently in rendering advice on the sale of the subject land from the first and second defendants to the first plaintiff. It is noted that the plaintiffs have not particularised the basis for the said representations and/or said duty of care, whether they are contractual or otherwise.

[11] Thus, in determining whether the defence of limitation applies, it would be pertinent to establish whether the plaintiffs' said causes of action are grounded in tort and/or contract.

[12] In determining whether the plaintiffs' causes of action are statute barred, it would be necessary to examine the relevant items of the schedule of the Sarawak Limitation Ordinance and ascertain whether the plaintiffs' claims herein are caught by the Sarawak Limitation Ordinance. The relevant items are items 19 and 97 of the Schedule of the Limitation Ordinance (Cap 49), which are reproduced below:

	Description of Suit	Period of Limitation	Time from which period begins to run
19.	For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided	Two years	When the malfeasance, misfeasance or nonfeasance takes place.
97.	For Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years	When the right to sue accrues.

[13] In *Capital One Ltd v. EC Corporate Management Inc & Ors* [2013] 1 LNS 819; [2013] 6 AMR 639, the plaintiff commenced proceedings against the defendants for breach of duty corporate malfeasance, and negligence on the basis that the defendants had caused it to give out dubious loans from June 2002 to January, 2005 and had taken out USD 23 million during that period. The High Court *inter alia* held at p. 644 as follows:

- A [8] The plaintiff has specifically pleaded corporate malfeasance. In *Mozley & Whiteley's Law Dictionary*, 10th edn, edited by ER Hardy Ivamy (Butterworths, London, 1988) which was cited by counsel for defendant, "malfeasance" is described as:
- B Malfeasance. The commission of some act which is in itself unlawful, as opposed to non-feasance, which is the omission of an act which a man is bound by law to do; and to misfeasance, which is the improper performance of some lawful act.
- C [9] The plaintiff has also pleaded negligence in this case. In *Vun Chun Fah & Anor v. Telekom Malaysia* [1998] 1 AMR 161; [1997] 1 LNS 165, Ian Chin J held that item 20 of the Limitation Ordinance of Sabah applies to a claim in negligence. As the plaintiff has pleaded malfeasance and negligence, in my opinion, their claim falls under the ambit of item 20 which is wide enough to include all of their pleas. However, the limitation period is only two years in this case. Therefore, as it is pleaded that the malfeasance and negligence was committed between 2002 and 2005, the action is clearly time barred as it was only instituted in June of 2012. Item 97 which is a residuary item provides for six years limitation period. However, even if this item is applicable, the plaintiff would still be late by one year. It must be noted that the defendants have specifically pleaded limitation under the Limitation Ordinance as a defence.
- D
- E [14] In *Ng Wu Hong v. Abraham Verghese TV Abraham & Ors* [2011] 6 CLJ 322; [2011] 4 AMR 32 the issue is whether the plaintiff's claim for damages for alleged misstatements in the statutory audit reports of the company of which he was the chief executive officer, was time barred under item 19 of the Sarawak Limitation Ordinance. In dismissing the claim on the ground that the claim is barred by limitation, the court held *inter alia* at pp. 39 to
- F 40 as follows:
- G [11] In *Vun Chun Fah & Anor v. Telekom Malaysia Bhd* [1998] 1 AMR 161; [1997] 1 LNS 165, Ian Chin J held that item 20 of the Limitation Ordinance of Sabah which is in pari material with item 19 of the Schedule of the Limitation Ordinance of Sarawak applies to a claim in negligence. Since the instant claim is not based on contract but on the alleged breach of duty of care owed by the defendants to the plaintiff who is a third party, in my view, it falls squarely under item 19. It follows that the cause of action in negligence cannot fall under item 97 as it is a residuary item. Item 97 can only be invoked if a cause of action is not covered under any other item. The limitation period under item 19 is only two years. The
- H audit reports were prepared in 1998. The writ was only filed in 2005. The plaintiff was therefore clearly barred by limitation law from filing this suit.
- I [12] Counsel for defendants submitted that even if the cause of action of the plaintiff in negligence falls under item 94 and 97 and the limitation period is six years, the limitation period was over when was over when the action was filed. In my opinion, the defendants' submission is correct. The writ in this case was filed on April, 20, 2005. Under item 97, the limitation period runs from the time of accrual of action. In the instant

case, a cause of action in negligence would arise when the last of the three reports were signed off by the defendants in March of 1999. The writ was however filed on April 20, 2005. The plaintiff is therefore late by at least one month.

A

[15] Applying the above legal principles to the factual matrix of the present case, this court finds that the plaintiffs' claim for damages based on the said negligent acts are time barred.

B

[16] This court finds that the plaintiffs' causes of action grounded on the breaches of warranties or representations of good title or right to sell the subject land and the rendering of negligent advice fall under malfeasance which is "some act which is in itself unlawful". (See *Capital One Ltd v. EC Corporate Management Inc & Ors* (*supra*)). The plaintiffs' pleaded case is that the first and second defendants, being natives never acquired a good title to the subject land which they could transfer to the first plaintiff. The purported sale of the subject land by way of a memorandum of transfer from Awang Osen to the first plaintiff as well as the execution of the power of attorney by the first plaintiff to the second to the sixth plaintiffs, took place on 25 September 2001. (Refer to paras. 5 and 9 of the amended statement of claim). Since both these two instruments namely the said the memorandum of transfer and the said power of attorney were registered on 8 October 2001, the plaintiffs' cause of action thus accrued on the said date.

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[17] Pursuant to item 19 of the Schedule of the Sarawak Limitation Ordinance, the limitation period for a claim under the tort of malfeasance, independent of contract ie, for loss and damage grounded on breach of warranty of good title or of right to sell and/or the rendering of negligent advice is two years from the date when malfeasance took place and the limitation period set in, on 8 October 2003 pursuant the said item 19 of the Schedule of the Sarawak Limitation Ordinance. The limitation period for the said malfeasance if based on contract under the residuary provision expired on 8 October 2007 pursuant to item 97 of the Schedule of the Sarawak Limitation Ordinance which is six years from the date when the malfeasance took place. Since the plaintiffs' claim in the present case was filed only on 19 September 2013, it is clearly time barred under both the said items 19 and 97 of the Sarawak Limitation Ordinance.

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G

Whether The Plaintiffs' Claim Grounded On Breach Of Oral Retainer Is Time Barred?

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[18] The plaintiffs also pleaded that the rendering of negligent advice, by advising on the sale of the subject land from the first and second defendants to the first plaintiff and of the rendering of advice on the appeal to the Court of Appeal against the decision of the High Court amounted to a breach of retainer of the solicitors. (Refer to paras. 16 to 19, 23 read with para. 24 of the amended statement of claim).

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A [19] In the present case, it is not pleaded that the retainer is in writing, nor are any particulars given of who executed it and when. No copy of any retainer in writing was exhibited by the plaintiffs. Thus it is safe for this court to assume that the breach complained, is that of an oral retainer.

B [20] Under item 93 of the Schedule to the Sarawak Limitation Ordinance, the period of limitation for compensation for breach of “any contract, express or implied, not in writing and not herein specially provided for” is three years and it accrues when the contract is broken and when there are successive breaches when the breach in respect of which the suit is instituted occurs.

C [21] In the present instant case, the plaintiffs pleaded breaches of oral contract for the rendering of negligent advice consist of the followings:

(a) the rendering of advice on the sale of the subject land from the first and second defendants to the first plaintiff which advice was relied upon, with the said memorandum of transfer executed on 25 September 2001 (refer to para. 7 of the amended statement of claim) and the registration was effected on 8 October 2001. (Refer to para. 13 of the amended statement of case); and

(b) the rendering of legal advice on the appeal against the decision of the High Court, took place on 20 February 2004 (refer to para. 16 of the amended statement of claim).

[22] Thus, the right of action for cause of action referred to in sub-para. (a) above accrued on 8 October 2001 and for the cause of action under sub-para. (b) above, accrued on 20 February 2004.

[23] Since both the above causes of action, founded on breaches of oral retainer are time barred as the present action was commenced only on 19 September 2013. The period of limitation for claims for rendering of negligent advice on the sale of subject land and for rendering of negligent advice on appeal against the decision of the High Court expired on 8 October 2014 and 20 February 2007 respectively.

Second Question Of Law: Whether The Causes Of Action Based Upon The Transactions Relating To All That Parcel Of Land Described As Lot 584 Block 35 Kemena Land District (Hereinafter Referred To As “The Said Land”) Pleaded In Paras. 4 To 13 And 23 Of The Amended Statement Of Claim Were/Are Illegal Or Tainted With Illegality On The Ground That These Transactions Contravened Ss. 8(a) And (B) Of The Land Code (Cap 81)

If The Answer To The Above Question Is In The Affirmative, Whether The Plaintiffs Are Entitled In Law To The Reliefs Claimed Under The Amended Statement Of Claim.

[24] In paras. 4, 13 and 23 of the amended statement of claim, the plaintiffs pleaded that the defendants have breached the followings: A

- (a) breach of the said letter of undertaking;
- (b) breach of retainer of the plaintiffs' as solicitors; and
- (c) breach of the warranty or representation of good title to and authority to sell the subject land and to pass or convey absolute ownership of the subject land to the first plaintiff. B

[25] Thus, the above causes of action related to the following transactions or dealings pertaining to the subject land (Lot 584 Block 35 Kemena Land District) and are pleaded in paras. 4 to 13 of the amended statement of claim namely: C

- (a) the sale and transfer of the subject land by the first and second defendants to the first plaintiff by the execution of a memorandum of transfer; and
- (b) the granting of an irrevocable power of attorney by the first plaintiff to the second and sixth defendants. D

[26] The defendants pleaded in their statement of defence *inter alia* as follows:

- 19. Further and/or in the alternative, the defendants will contend that all the transactions or dealings pertaining to the said land referred to in paragraphs 4 to 13 of the Amended Statement of Claim, including the sale and transfer of the said land to the 1st plaintiff, were illegal as they were prohibited by Sections 8(a) and 8(b) of the Land Code (Cap 81). E
- 20. The Defendants will say that, by virtue of Section 8(b) of said Ordinance, the consideration of the sum of RM205,000.00 for the transfer of the said land is irrecoverable. In the said premises, the claim for the sum of RM205,000.00 under prayer (a) is unsustainable in law. F
- 21. The Defendants will further say that the plaintiffs' claim for loss and damages under prayer (b) based upon ownership or deprivation of the ownership of the said land is tainted with illegality pleaded in paragraph 14A 15B above and is, therefore, unsustainable in law. G

[27] In his action *vide* Bintulu High Court Suit No. 24-91-2003, the registered owner, Awang Osen successfully sued the first plaintiff, *inter alia*, for a declaration that the said transactions relating to the same subject land were illegal, null and void. In his judgment which is reported as *Awang Osen Awang Mat v. Norhazleena Abdurani & Ors* [2004] 7 CLJ 1, Abdul Aziz Rahim JC (as he then was) *inter alia* held as follows: H

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A In this instant case too, the power of attorney was purportedly executed by a native donor, the plaintiff, in favour of a non-native donee, one Moi Yee Khoo, purportedly empowering the donee to exercise the rights over the said land on behalf of the donor. But having perused the provisions in the powers of attorney I find that the donor is only a nominal owner.
B It is pertinent to note that the 1st PA is an irrevocable PA. The real rights and privileges over the land are vested with the donee. Therefore, in this case, I am of the same view as that of Skinner J that the power of attorney is a colourable device to evade the provisions of the Code namely s. 8 of the Code.

C Thus, following the reasoning and decision of Skinner J in *Pawa ak Ajah* I hold that the 1st PA effectively transferred all rights and interest over the said land in the Native Area Land to a non-native - a Chinese; something that is prohibited by s. 8(b) of the Code.

Since the 1st PA is illegal, it follows therefore that Moi cannot acquire good title to pass on the subsequent donees.

D On the same premises, the deed of substitution of power of attorney (the 2nd PA) executed by Moi Yew Khoo, as attorney for the plaintiff (exh. D in plaintiff's affidavit) to transfer the rights and interest in subject land to non-natives namely one Antonio Sim Peck Khiong and Chee Seng Hee, both of Chinese origin, is invalid for contravening s. 8(a) of the Code. In the circumstances the subsequent 2nd PA could not also
E pass good title to its recipient. It follows therefore that Antonio and Chee could not acquire or pass good title over the subject land to the 1st defendant. Thus the MOT (exh. F in plaintiff's affidavit) executed by Antonio and Chee in favour of the 1st defendant is bad in law and void.

F [28] This court finds that the findings of the Honourable High Court Judge in *Awang Osen Awang Mat v. Norhazleena Abdurani & Ors* (*supra*) that the first power of attorney from Awang Osen to Moi Yee Kew, is "a colourable device to evade the provisions of the Code, namely s. 8 of the Code" and also the deed of substitution of power of attorney granted to the first and second defendants is "invalid for contravening s. 8(a) of the Code" are
G supported by s. 8 of the Sarawak Land Code which are reproduced below for ease of reference:

8. Save as provided in section 9 -

H a person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area Land;

I any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege, shall be deemed to have been entered into for an illegal consideration; and, in particular but without prejudice to paragraph (d), any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished.

(emphasis added)

[29] Further support can be found in s. 24 of the Contracts Act 1950 which was considered by the Supreme Court in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57; [1990] 1 MLJ 356, where Hashim Yeop Sani CJ stated as follows:

We now come to s. 24 of our Contracts Act 1950. The relevant parts of s. 24 of the Act read as follows:

The considerations or object of an agreement is lawful unless

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) ...

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or considerations is unlawful is void.

[30] In the present case, the Honourable High Court Judge in the related case, *Awang Osen Awang Mat v. Norhazleena Abdurani & Ors (supra)*, in his judgment which was reproduced above, made a finding that the deed of substitution of power of attorney in respect of the same subject land whereby the first and second defendants were conferred with power or right to sell on behalf of the original registered proprietor, Awang Osen, to be invalid, as follows:

On the same premises, the deed of substitution of power of attorney (the 2nd PA) executed by Moi Yew Khoo, as attorney for the plaintiff (exh. D in plaintiff's affidavit) to transfer the rights and interest in subject land to non-natives namely one Antonio Sim Peck Khiong and Chee Seng Hee, both of Chinese origin, is invalid for contravening s. 8(a) of the Code.

[31] Thus, from the above, it is clear that the source of the authority to sell and for the execution of the transfer to the first plaintiff was the said deed of substitution of power of attorney and the High Court in *Awang Osen Awang Mat v. Norhazleena Abdurani & Ors (supra)* found that it was a device to circumvent or defeat the prohibition under s. 8(a) of Land Code and was therefore, illegal and void for public policy. Consequently, the memorandum of transfer whereby the subject land was transferred to the first plaintiff was tainted with the illegality and thus ineffective to confer a good title on the first plaintiff. Since the first and second defendants (being non-natives), did not acquire any right or privilege over the subject land which is native land. Further, by virtue of s. 8(b) of the Sarawak Land Code, this court finds and holds that the first plaintiff is not entitled to recover the consideration paid

A by her pursuant to the transfer because it is expressly provided therein that “any consideration which shall have been paid or furnished shall not be recoverable in any court ...”. It follows that any claim for loss or damage based upon the illegal transaction (ie, the transfer from the first and second defendants to the first plaintiff in the present case, is also irrecoverable.

B [32] In *Maria Tunku Sabri v. Datuk Wan Johani Wan Hussin* [2011] 8 CLJ 859 at p. 867 the court held:

C [26] Under s. 24 (a) of the Contracts Act 1950 an agreement is illegal and unenforceable when either the consideration or the object of the agreement is to do an act which is forbidden by law. It is illegal and unenforceable under s. 24(a) of the Contracts 1950 because it is a contract involving consent of both contracting parties to do the very act prohibited or forbidden by statute.

[27] ...

D [28] ...

[29] The court will not enforce a contract which is expressly or impliedly prohibited by statute. If the court is to allow the plaintiff to enforce the settlement agreement, the court would be enforcing a contract (first agreement) which is prohibited by statute.

E [33] In the light of the above, this court finds that the plaintiffs’ causes of action based upon the said transactions relating to all that parcel of land described as Lot 584 Block 35 Kemena Land District pleaded in paras. 4 to 13 and 23 of the amended statement of claim were/are illegal or tainted with illegality on the ground that these transactions contravened ss. 8(a) and (b) of the Land Code (Cap 81). In the premises, the plaintiffs are not entitled in law to the reliefs claimed under the amended statement of claim.

F *Third Question Of Law: Whether The Plaintiffs Were Disentitled Or Precluded From Claiming For A Refund Of Rm205,000 Under The Letter Of Undertaking Although The Event Upon Which The Refund Was Contingent, That Is, The Registration Of Both The Memorandum Of Transfer And The Power Of Attorney Had Occurred And, Consequent To The Said Determination, The Plaintiffs’ Claim Filed Herein Or Such Part(s) Of The Claim Filed Herein To Be Dismissed.*

G [34] The plaintiffs in paras. 12 to 15 and 23 of the amended statement of claim pleaded that pursuant to the letter of undertaking dated 25 September 2001, the defendant’s Bintulu firm had undertook to refund the sum of RM205,000 in the event that the memorandum of transfer and the power of attorney could not be registered. This undertaking was breached because although these documents were registered, they were declared to be illegal, null and void in the earlier proceedings under the said Originating Summons No. 24-91-2003 *vide Awang Osen Awang Mat v. Norhazleena Abdurani & Ors* (supra).

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[35] Pursuant to item 94 of the Schedule of the Limitation Ordinance, any claim for compensation for breach of a contract in writing must be brought within six years from the date “when the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs ...”. In the present case, the memorandum of transfer and the power of attorney (which had been duly registered with the relevant Land Registry) were declared to be null and void by the Order of the High Court in the earlier proceedings pursuant to the said Originating Summons on 26 January 2004 *vide Awang Osen Awang Mat v. Norhazleena Abdurani & Ors (supra)*. Thus, the period of limitation for instituting the present action has expired on 26 January 2010.

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[36] In the light of the above, this court finds that since this present action was instituted only on 19 September 2013, the plaintiffs’ claim grounded on the breach of the said letter of undertaking is barred by item 94 of the Schedule to the Limitation Ordinance.

[37] The plaintiffs in paras. 12 to 15 and 23 of the amended statement of claim pleaded that pursuant to the said letter of undertaking dated 25 September 2001, the defendant’s Bintulu firm, undertook to refund the sum of RM205,000 in the event that the memorandum of transfer and the power of attorney could not be registered. This undertaking was breached because although these documents were registered, they were declared to be illegal, null and void in the earlier proceedings under Originating Summons No. 24-91-2003 *vide Awang Osen Awang Mat v. Norhazleena Abdurani & Ors (supra)*.

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[38] Pursuant to item 94 of the Schedule of the Sarawak Limitation Ordinance, any claim for compensation for breach of a contract in writing must be brought within six years from the date “when the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs ...”. In the present case, since the memorandum of transfer and the power of attorney (which had been duly registered with the relevant Land Registry) were declared to be null and void by the Order of the High Court in the earlier proceedings under the said Originating Summons on 26 January 2004 *vide Awang Osen Awang Mat v. Norhazleena Abdurani & Ors (supra)*. Thus, the period of limitation for instituting the action expired on 26 January 2010.

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[39] In the light of the above, this court finds that since this present action was only instituted on 19 September 2013, the plaintiffs’ claim grounded on the breach of the said letter of undertaking is thus barred by item 94 of the Schedule to the Limitation Ordinance.

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[40] By paras. 12 and 23 of amended statement of claim, the plaintiffs pleaded that the defendants are in breach of the said letter of undertaking dated 25 July 2001 whereby the defendants undertook to refund to the

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A plaintiffs, the sum of RM205,000 in the event that the said memorandum of transfer and power of attorney could not be registered for whatever reason.

[41] A perusal of the said letter of undertaking showed that the refund of the sum of RM205,000 was contingent upon the event that memorandum of transfer and the power of attorney were not registrable. However, this
B contingency did not arise as it is undisputed that both the said instruments were duly registered with the Bintulu Land Office on 8 October 2001. In the premises, the plaintiffs cannot claim for the said sum RM205,000.

[42] Further, this court finds that it is not disputed that the said sum of RM205,000 was the consideration for the purchase of the subject land which
C was based on illegal transaction that was in clear breach of s. 8(a) and (b) of the Sarawak Land Code (Cap 81) and therefore to order the refund of the said sum of RM205,000 to the plaintiffs, shall be an infringement of the express provisions of s. 8 (b) of the Sarawak Land Code (Cap 81) which clearly stated that any consideration which shall have been paid or furnished shall not be
D recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished.

Courts Finding

[43] In the light of this court's above findings, this court thus answers the
E said three questions of law as follows:

(a) First Question of Law

This court finds that the plaintiff's claims for the said breach of warranties of good title or right or power to sell the land and/or the
F rendering of negligent advice are barred by item 19 and 97 of the Sarawak Limitation Ordinance. Further the plaintiffs' claim founded on breach of oral retainer is also time barred by item 93 of Schedule of the Sarawak Limitation Ordinance. The plaintiffs' claim for breach of the said letter of undertaking dated 25 September 2001 is also time barred by virtue of item 94 of the Schedule to the
G Sarawak Limitation Ordinance.

(b) Second Question of Law

This court finds that the plaintiffs' causes of action based upon the transactions relating to the subject land and pleaded in paras. 4 to
H 13 and 23 of the amended statement of claim are illegal or are tainted with illegality and are, therefore, void as against public policy.

Consequently the plaintiffs are not entitled to the reliefs claimed
I under the Amended Statement of Claim.

(c) Third Question of Law

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This court finds that the plaintiffs are precluded from claiming for a refund of RM205,000 pursuant to the said letter of undertaking as the event upon which it becomes payable, has not occurred. Furthermore, to allow the refund of the said RM205,000 shall be a clear infringement of the express provisions of s. 8 (b) of the Sarawak Land Code (Cap 81).

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Order

[44] In the light of this court above findings, this court grants an order in terms of encl. 11 and orders that the plaintiffs' claim filed herein be dismissed with costs.

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